SUPREME COURT, U. S.
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No. 73-214

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA,

Respondent,

vs.

CHRIS CARDI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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UNITED STATES OF AMERICA,

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vs.

CHRIS CARDI,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Chris Cardi, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at ..... F.2d ..... This opinion is printed in the appendix (A. 1) to this petition. The opinion of the United States District Court for the Northern District of Illinois is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on April 16, 1973. A timely petition for rehearing was denied on July 2, 1973. This petition was filed within 30 days of that date. This Court has jurisdiction under 62 Stat. 928, 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

1. Whether the Seventh Circuit decision violates the rule established by this Court in *Lutwak* v. *United States,* 344 U.S. 604 (1953), by allowing a hearsay declaration of a co-conspirator to be used as evidence against petitioner even though the declaration occurred, as the Court of Appeals found, two months after petitioner's participation in the conspiracy ended.

2. Whether this case should be remanded for resentencing under the rule set forth in *United States* v. *Tucker,* 404 U.S. 443 (1972) on the grounds that the sentencing court improperly considered, in fixing the length of the sentence, evidence admitted against petitioner in violation of the Sixth Amendment and the fact of conviction on two counts which were subsequently reversed for insufficient evidence.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

The questions presented by this petition, which involve the admission of hearsay testimony and sentencing in a federal prosecution, also invoke the supervisory power of this Court.

STATEMENT OF THE CASE

This petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit, affirming a jury verdict of guilty on four of seven counts of an indictment for conspiring to and selling narcotics in violation of 26 U.S.C. § 4705(a) and 21 U.S.C. § 174. Petitioner was found guilty under section 174 of conspiring to and making sales of narcotics on September 25, October 1, and October 15, 1970. Petitioner was acquitted of similar charges under section 4705(a). Evidence admitted against petitioner included a taped telephone conversation between a paid government informer and a co-defendant which occurred on November 28, 1970. On appeal, the Seventh Circuit reversed petitioner's convictions for the sales of October 1 and October 15, 1970. The appellate court found that "the conspiracy, so far as Cardi was concerned, ended [on September 25, 1970]." (A. 14).

The seven count indictment in this case charged petitioner, Virgil Cimmino and Frank Micelli with conspiracy and sales of narcotic drugs. Micelli was acquitted on all counts; Cimmino was convicted on all counts;* petitioner was convicted on counts 1, 3, 5 and 7. Petitioner is presently incarcerated in Terre Haute Federal Penitentiary, Terre Haute, Indiana. His scheduled release date is October 29, 1981.

The evidence at trial showed that Paul Moore, a paid government informer, solicited Cimmino to engage in the sale of narcotics. On September 23, Cimmino sold Moore and Weinstein, an undercover federal agent, a bag of flour

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* Cimmino has filed a petition for certiorari which is docketed in this Court as No. 72-6972.

for $4,400. There was no evidence that petitioner knew of or was involved in any way with this transaction.

After discovering that the substance they purchased was flour, Moore and Weinstein began to search for Cimmino. On September 24, Moore and Weinstein went to petitioner's house in an attempt to find Cimmino. Both Moore and Weinstein testified to the following conversation which was the only conversation that any government witness claimed to have had with petitioner. (R. 64-65) *

> "Dickie, I want to talk to you about Virgil," called Moore.
>
> "Sure, what is it?" said Mr. Cardi.
>
> "Well, you know we are doing business with him buying stuff," said Moore.
>
> "Stuff?" asked Mr. Cardi.
>
> Moore said, "Yes, heroin. He burned us. He gave us four ounces of flour or something and took $4,400 last night for it."
>
> Mr. Cardi said, "If it was anybody but you,** I wouldn't talk to you about the stuff. But I will check into it and do whatever can be done."
>
> Moore said, "Thanks, I really need the stuff."
>
> Cardi said, "You'll get it."

Petitioner's purported statement that "you'll get it" was *not* included in either Moore's or Weinstein's statements written shortly after the conversation. (R. 767). Notwithstanding the omission of these essential words in their reports which were produced by the government pursuant to 18 U.S.C. § 3500, both witnesses purported to recall the statement at trial.

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* "R." refers to petitioner's appendix filed in the Seventh Circuit and made a part of the record herein.

** Moore had testified that he knew Mr. Cardi socially. (R. 43)

On September 24, Moore testified that he received a phone call from Cimmino. Cimmino said, "you're going to get your stuff. Dickie [Cardi's nickname] is on my back." (A. 11) A meeting was set up among Cimmino, Moore and Weinstein. On September 25, 1970, Cimmino delivered heroin to Moore and Weinstein.

Cimmino's testimony contradicted the testimony of Moore and Weinstein. Cimmino claimed that Moore threatened to kill him unless he delivered the heroin. Cimmino's testimony exculpated petitioner in all respects.

In November 28, 1970, Cimmino and Moore had a lengthy telephone conversation which Moore taped. Moore testified to the substance of this conversation. In addition, the tape recording was played for the jury and a transcript of it was given to each juror to read as the tape was played. A transcript of this conversation is included in the appendix filed in the Seventh Circuit Court of Appeals (R. 727-766). Portions of the conversation are set forth in the decision of the Court of Appeals. (A. 4-6).

Through government witnesses, it was established that petitioner was not present during any of the three sales; that no narcotics were ever found in petitioner's possession; that none of the listed money used by the government agents was ever found in petitioner's possession; and that petitioner was not the source of the narcotics.

On appeal, petitioner argued that the evidence was insufficient to sustain his conviction on all counts. The Court of Appeals reversed counts 5 and 7 finding that there was "no evidence that Cardi even had knowledge of these sales." (A. 14). Although the court affirmed the conspiracy count and the count charging the sale on Septem-

ber 25, the court held that the conspiracy ended "so far as Cardi was concerned" at that time [September 25]. (A. 14).

The district court sentenced petitioner to five years in prison on the conspiracy count and five years on each of the three sales counts to run concurrent with each other but consecutive to the five years on the conspiracy count. During the sentencing hearing, the government argued that the taped telephone conversation demonstrated petitioner's involvement in the entire course of conduct. (A. 18) The trial court found explicitly that petitioner was the focal point of all the criminal activity charged in the indictment; that none of the sales could have occurred without petitioner; and, that petitioner was more involved in the criminal activity than any other defendant. (A. 19).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

The Seventh Circuit's decision in this case is directly contrary to the holdings in *United States* v. *Lutwak*, 334 U.S. 604 (1953) and *Krulewitch* v. *United States*, 336 U.S. 440 (1949). The evidence clearly shows that the taped telephone conversation occurred long after petitioner's miniscule role in the conspiracy ended. The taped telephone conversation was submitted to the jury three separate times. The conversation is replete with hearsay references to petitioner gratuitously and suggestively supplied by the paid government informer, Moore.

In light of the circumstances of this case, the error in admitting the taped telephone conversation against petitioner without limiting instructions was prejudicial. This was an extremely close case. The evidence against petitioner consisted entirely of his alleged statement, "you'll get it," (which was suspiciously absent from the agents' 3500 statements), co-defendant Cimmino's hearsay statement, "Dickie is on my back," and Cimmino's delivery of heroin on September 25, 1970. The jury demonstrably gave effect to the taped telephone conversation by convicting petitioner on counts 5 and 7, counts on which the Court of Appeals found and the record demonstrates there was absolutely no evidence against petitioner. Finally, since petitioner did not take the stand and no physical evidence was introduced against him, petitioner's conviction rested entirely upon the credibility of the two government agents. The effect of the taped telephone conversation was to cause the jury to give more credence to the agents' testimony than if the conversation had not been admitted or if the jury had been instructed not to consider the conversation against petitioner.

The trial court also considered the taped telephone conversation against petitioner in fixing petitioner's sentence. Although that conversation was admitted against petitioner in violation of his sixth amendment right and in violation of the rules of evidence established by this Court in federal conspiracy cases, the trial court nevertheless considered it. Additionally, the trial court was influenced by the jury's guilty verdicts on counts 5 and 7. Convictions on these two counts were reversed by the Court of Appeals not for insufficient evidence, but rather for *no* evidence whatsoever. The trial court's consideration of these two factors violates the rule of *United States* v. *Tucker*, 404 U.S. 443 (1972). The Court of Appeals has denied petitioner's request that he be resentenced.

I.

THE COURT OF APPEALS IMPROPERLY REFUSED TO FOLLOW THIS COURT'S RULE SET FORTH IN LUTWAK v. UNITED STATES AND KRULEWITCH v. UNITED STATES

Petitioner argued in the Seventh Circuit that the evidence was insufficient to show that petitioner participated in a conspiracy. In the alternative, petitioner argued that the conspiracy ended on October 15, 1970 when the central objective of the conspiracy was achieved. Petitioner pointed out that the taped telephone conversation was admitted over objection and without limiting instructions even though it took place on November 28, 1970. Petitioner argued, on the authority of *Lutwak* and *Krulewitch*, that the conviction as to all counts must be reversed and remanded for a new trial. The Seventh Circuit held that petitioner's participation in the conspiracy ended on September 25, 1970. The opinion of the court is silent as to

the error occasioned by the admission of the taped telephone conversation.*

The rule of *Lutwak* and *Krulewitch* is clear. Relevant post-conspiracy declarations of co-defendant Cimmino were admissible against Cimmino, as the declarant, to prove his part in the crime charged. However, since petitioner's participation in the conspiracy had ended, these post-conspiracy declarations were inadmissible as to him.

In *Lutwak* v. *United States*, 344 U.S. 604, 618 (1953), this Court stated:

> "Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the declarant to prove the declarant's participation therein. *The court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only.* Therefore, when the trial court admits against all of the conspirators a relevant declaration of one of the conspirators after the conspiracy has ended, without limiting it to the declarant, it violates the rule laid down in *Krulewitch* [336 U.S. 440 (1949)]. Such declaration is inadmissible as to all but the declarant." (Emphasis added.)

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* In his petition for rehearing, petitioner again argued this point to the Court of Appeals. The Court ordered the government to answer that part of the petition for rehearing. The government's answer fails completely in its attempt to distinguish *Lutwak*. In fact, the answer admits error and demonstrates a failure on the government's part to comprehend the *Lutwak* rule. At page 2 of its answer, the government states: "Since Cardi's participation in the conspiracy insofar as the September 25 sale was concerned was established by his own words and actions, the Cimmino-Moore conversation was properly admissible against Cardi as further evidence of that conspiracy."

Accord: *Krulewitch* v. *United States,* 336 U.S. 440, 442 (1949): *Fiswick* v. *United States,* 329 U.S. 211, 217 (1946); *United States* v. *Birnbaum,* 337 F.2d 490, 495-96 (2d Cir. 1964) (alternate holding); *Abbate* v. *United States,* 247 F.2d 410, 413 (5th Cir. 1957) (reversing as to two defendants even though limiting instructions were given), *aff'd.,* 359 U.S. 187 (1959) (as to remaining defendants).

In *Lutwak,* this Court said that declarations of a conspirator "can be used against the co-conspirator only when made in furtherance of the conspiracy. There can be no furtherance of a conspiracy that has ended. Therefore, the declarations of a conspirator do not bind the co-conspirator if made after the conspiracy has ended." (344 U.S. at 617-18).

The trial court disregarded the rule in *Lutwak,* refused to direct a verdict of acquittal for petitioner on the sales subsequent to September 25, 1970, and refused to instruct the jury to disregard the taped telephone conversation as to petitioner. The Court of Appeals reversed the convictions on the sales subsequent to September 25, 1970 and found that petitioner's participation in the conspiracy ended as of September 25, 1970, but, without explanation, refused to follow the rule in *Lutwak.* If the decision of the Court of Appeals in this case stands unreviewed, petitioner will stand convicted in contravention of the rules of evidence established by this Court and of the Sixth Amendment to the United States Constitution.

II.

THE ADMISSION OF THE TAPED TELEPHONE CONVERSATION WAS NOT HARMLESS ERROR

This is not a proper case for the application of Rule 52(a) of the Federal Rules of Criminal Procedure. The

error in the admission of the taped telephone conversation was extremely prejudicial for the reasons set forth below.

1. The government's case against petitioner was incredibly weak. Evidence of petitioner's own words and actions consisted entirely of the statement attributed to him by Moore and Weinstein—"you'll get it." The severe impeachment inherent in the failure of both Moore and Weinstein to include these words in their reports written shortly after the incident rendered the government's case even weaker. "A failure to assert a fact, when it would have been natural to assert it, amounts in effect to the nonexistence of the fact." IIIA Wigmore on Evidence § 1042 (Chadbourn ed. 1970). See also McCormick on Evidence §34 (2d ed. 1972); Proposed Federal Rules of Evidence § 803 (7), 56 F.R.D. 194, 301.

The hearsay evidence admitted against petitioner consisted of the taped telephone conversation and Cimmino's alleged statement to Moore on September 24 that "Dickie is on my back."

2. The taped telephone conversation contains repeated references to "D.C." and "Dickie". The references to petitioner were almost universally provided by government informer, Moore. More importantly, however, the conversation served improperly to corroborate Moore's and Weinstein's testimony. During the conversation, reference was made to names, places, and events which had previously been testified to by both of the agents. The effect of the conversation was to cause the jury to give more credence to the agents' testimony, including the testimony that petitioner said "you'll get it", by corroborating testimony they had previously given. Under similar circumstances, the Court of Appeals for the District of Columbia has reversed convictions even though limiting instructions were

given. See *Laughlin* v. *United States,* 344 F.2d 187, 192-93 (D.C. Cir. 1965).

3. The harmless error test was stated by this Court to be "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut,* 375 U.S. 85, 86-7 (1963). See also *Chapman* v. *California,* 386 U.S. 18, 23-4 (1967); *Kotteakos* v. *United States,* 328 U.S. 750, 765 (1946).

In petitioner's case, there can be no doubt but that the taped telephone conversation contributed to his conviction. The conversation had a demonstrable effect on the jury. Despite the fact that the Court of Appeals found and the record demonstrates that there was no evidence whatsoever implicating petitioner in the sales of October 1 and 15, the jury nevertheless found petitioner guilty of those sales. The only evidence from which petitioner's complicity in those sales could possibly have been inferred is the taped telephone conversation of November 28. Although a close reading of the conversation demonstrates that this is a totally unwarranted inference, the fact remains that the jury drew it. If the jury was prepared to infer petitioner's participation in the sales of October 1 and 15 from the November 28 conversation, nothing prevented the jury from using it to infer petitioner's complicity in the offenses charged in counts 1 and 3.

The prejudicial effect of the conversation is further demonstrated by the fact that the trial court also drew inferences from the conversation. At the close of the government's case and at the close of all the evidence, petitioner moved for a directed verdict on counts 5 and 7 [the October 1 and 15 sales counts]. These motions were denied, assumedly on the strength of the taped telephone conversation since there was absolutely no other evidence against petitioner relating to these sales.

The trial court's erroneous refusal, upon the urging of the government, to direct verdicts on counts 5 and 7 forced the jury to consider the taped telephone conversation on all counts.

The government introduced the taped telephone conversation at trial against all defendants over their objections and intended the evidence to be considered by the jury as to all counts as demonstrated by the instructions tendered to the trial judge by the government. Under the circumstances of this case, there is more than a reasonable possibility that the taped telephone conversation contributed to petitioner's convictions on counts 1 and 3.

III.

PETITIONER WAS SENTENCED IN VIOLATION OF UNITED STATES v. TUCKER

In *United States* v. *Tucker*, 404 U.S. 443 (1972), this Court held that prior convictions obtained in violation of a person's sixth amendment right to counsel could not be considered by a sentencing court in determining a proper sentence. It is clear from the record in this case that the district judge's sentence was strongly influenced by the taped telephone conversation which was admitted against petitioner in violation of his sixth amendment right to confrontation and in violation of settled rules of evidence. (A. 18-9).

Petitioner recognizes the broad discretion lodged in the sentencing judge to impose sentence within the statutory limits. Appellate courts have generally refrained from reviewing this discretion. However, appellate courts have consistently reviewed the information considered by the trial court in fixing the sentence. Where the record shows

consideration of constitutionally inadmissible evidence, the sentence will be vacated and remanded for resentencing. See, e.g., *Verdugo* v. *United States,* 402 F.2d 599, 611 (9th Cir. 1968), *cert. den.,* 397 U.S. 925 (1970) (consideration of evidence seized in violation of fourth amendment). See also *Armpriester* v. *United States,* 256 F.2d 294, 297 (4th Cir. 1958) (consideration of confession obtained in violation of F.R.Cr.P. 5(a); *United States* v. *Picard,* 464 F.2d 215, 220 (1st Cir. 1972) (failure of district court to disclose what portions of presentence report court relied on where report contained unverified statements connecting defendant with serious criminal activity).

Additionally, the record demonstrates that the district judge was influenced by the fact that the jury convicted petitioner on each of the sales counts. At the sentencing hearing, the district judge stated in essence that petitioner was the "focal" point of the entire course of criminal conduct. (A. 19). The Court of Appeals has reversed petitioner's convictions on counts 5 and 7 finding that there was absolutely no evidence showing that petitioner "even had knowledge of these sales." (A. 14).

This case should be remanded for resentencing with the sentencing judge instructed to disregard the taped telephone conversation and the jury verdicts on counts 5 and 7. Even though the sentences run concurrent with the sentence on Count 3, it cannot be said that the "impermissible convictions" did not influence the sentences on the permissible convictions. *United States* v. *Parker,* 442 F.2d 779, 781 (D.C.Cir. 1971).

In *McGee* v. *United States,* 462 F.2d 243 (2d Cir. 1972) Chief Judge Friendly remanded for resentencing in a case where four equal concurrent sentences had been imposed

and one count was reversed on appeal. Relying on *United States* v. *Tucker*, 404 U.S. 443 (1972), the court stated (462 F.2d at 245):

> "We believe that this case presents a problem not without some analogy. We deal here with a conviction on four counts which were prosecuted in one trial and upon which identical concurrent sentences were simultaneously imposed. However, the conviction under one of those counts has now been determined to have been unlawful. The trial judge's original sentencing determination with respect to counts 2 through 4 could have been influenced by appellant's conviction under count 1—just as evidence of a prior conviction might influence a sentencing judge on a subsequent one. If such were in fact the case, appellant's initial sentences under counts 2 through 4 would require reconsideration."

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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